

## ML10 Handout – Torts II: Right of Privacy

*[slide numbers are in square brackets]*

### 1) [2] Right of Privacy Intro

- a. Defamation deals with harm to **reputation**, whereas the right of privacy deals with the **right to be** \_\_\_\_\_ left alone \_\_\_\_\_
- b. Four Right of Privacy Torts
  - (1) **false light** invasion of privacy (FLIP)
  - (2) **intrusion upon seclusion**
  - (3) **public disclosure of a private fact** (PDPF)
  - (4) **misappropriation** of name, likeness and identity (NLI)

### 2) [3] False Light Invasion of Privacy (FLIP)

- a. Definition: A false statement or report that makes a person to appear to be someone he or she is not in the eyes of the public
- b. Elements: (1) Publicity placing the Plaintiff in a false light (\_\_\_\_ identification \_\_\_\_); (2) discloses information presented as factual but is **actually false**; (3) highly **offensive to a** \_\_\_\_\_ reasonable person \_\_\_\_\_ (**RP**); (4) causes \_\_\_\_\_ actual damage \_\_\_\_\_ to the Plaintiff
- c. Element 2: Information that is presented as true but actually false; court will look at the Defendant's intent
  - i. Information must be \_\_\_\_\_ misleading \_\_\_\_\_ and \_\_\_\_\_ offensive \_\_\_\_\_
- d. Element 3: Highly offensive to a reasonable person (RP); societal standard
- e. Element 4: Damages - can be any harm (not just reputation)
  - i. Ex: \_\_\_\_\_ harms to privacy, dignity, or emotion \_\_\_\_\_

### [4] FLIP Factors

- f. **Embellishment** - Adding false material to otherwise true facts
- g. **Distortion** - Omitting facts or context to make an otherwise accurate story appear false
- h. **Fictionalization** - Including some element or truth in a largely fictional piece

- i. Distinctions from Defamation: (1) Plaintiff has to prove \_\_\_\_\_ actual malice \_\_\_\_\_, regardless of whether the Plaintiff is a \_\_\_\_\_ public or private figure \_\_\_\_\_. In defamation, private figures prove \_\_\_\_\_ negligence \_\_\_\_\_. (2) Statement needs to be made to a \_\_\_\_\_ mass group \_\_\_\_\_. \_\_\_\_\_; only 1 person is needed for Defamation

### **[5] FLIP Cases**

- summary judgement:  
means before trial they  
determined there was no  
issue
- j. Facts: E! documentary on Paula Abdul references alleged affair with disqualified American Idol contestant Corey Clark back in 2005 during Season 2 of American Idol. Clark sues E! network. Result? case was dismissed on summary judgement (before trial)  
Why? Corey Clark wasn't able to prove actual malice

### **3) [6] Intrusion Upon Seclusion** – A physical or technological disturbing into someone's reasonable expectation of privacy (**REOP**)

- a. Elements: (1) Defendant intentionally intruded into a \_\_\_\_\_ private place, conversation, or matter \_\_\_\_\_. (2) highly offensive to RP; (3) P has **REOP** in the information
- b. What do we have a high REOP in? your person and your property \_\_\_\_\_
- c. Limited REOP: invited guests, attending concert/sporting event
- d. No REOP: trespassing, public property, employer, borders/customs
  - i. **Electronic Intrusion** - Employers/customs \_\_\_\_\_ can read \_\_\_\_\_ people's e-mails or texts
- e. **Defenses to Intrusion**: (1) **Consent**; (2) **False Pretenses**; (3) **Newsworthiness**
- f. [7] *Sanders v. ABC* - Undercover reporter posed as a psychic, employee discussed her personal hopes and dreams which was broadcast on national TV; **network found liable** as an employee has a REOP that their conversations will not be \_\_\_\_\_ secretly videotaped \_\_\_\_\_

### **4) [8] Public Disclosure of Private Facts (PDPF)**

- a. Definition: The publication of \_\_\_\_\_ truthful \_\_\_\_\_ private information that is not of legitimate public concern

- b. Elements: (1) **Public disclosure** (2) of a **private fact** which is (3) not of legitimate public concern and (4) the disclosure is **highly offensive to a reasonable person**
- c. **Element 1: Public Disclosure** – Applies if disclosure made to a small group of people with a \_\_\_\_\_ special relationship \_\_\_\_\_ (ex: \_\_\_\_\_ co-workers \_\_\_\_\_)
- d. **Element 2: Private Fact** - Involves a person's \_\_\_\_\_ most personal information \_\_\_\_\_ (ex: \_\_\_\_\_ financial situation, \_\_\_\_\_ marital status, Professor Spitz's extra toe \_\_\_\_\_)
- \*\*\*\*\*
  - e. **Element 3: Not of Legitimate Public Concern** - Plaintiff must show that the information being disclosed is \_\_\_\_\_ not newsworthy \_\_\_\_\_
    - i. **Newsworthiness Factors** - proximity, timeliness, significance, prominence, human interest
  - f. **[9] *Diaz v. Tribune*** – Magazine company interviews Plaintiff under the pretense of their student council record and discloses their gender reassignment surgery.
    - i. Result? Defendant **publisher was found liable** as this was a \_\_\_\_\_ morbid and sensational prying, and not newsworthy \_\_\_\_\_
  - g. **[10] PDPF 1<sup>st</sup> Amendment Defense** - Protects the publication of private facts if there is some \_\_\_\_\_ public significance \_\_\_\_\_ and the information was \_\_\_\_\_ lawfully obtained \_\_\_\_\_

## 5) **[11] Misappropriation of NLI**

- a. Definition: Where a company uses your \_\_\_\_\_ name \_\_\_\_\_, \_\_\_\_\_ likeness \_\_\_\_\_ and \_\_\_\_\_ identity \_\_\_\_\_ without permission for commercial gain
- b. The right of publicity includes the right of \_\_\_\_\_ survivorship \_\_\_\_\_, which can be willed to family
- c. **[12] Right of Publicity/Commercialization Elements**: (1) NLI was used; (2) in a manner that **identified** that person; (3)

distributed; (4) for \_\_\_\_\_ commercial or trade purposes \_\_\_\_\_;  
(5) without permission

- d. **[13] *Vanna White v. Samsung***: Ad campaign features Wheel of Fortune co-host as a robot turning letters next to a game board. White not compensated or asked permission.  
Result? \_\_\_\_\_ White won \$400,000; example of misappropriation \_\_\_\_\_

**6) [14] Right to Privacy Tort Defenses**

- a. **Defenses**: Newsworthiness, Public Domain, Incidental (de minimis) Use, Consent, 1<sup>st</sup> Amendment
- b. Media entities and publishers have the right to \_\_\_\_\_  
\_\_\_\_\_ editorial discretion \_\_\_\_\_ under the 1<sup>st</sup> amendment.  
The 1<sup>st</sup> Amendment also protects using celebrities' names in media so long as the material concerns matters of  
\_\_\_\_\_ public interest \_\_\_\_\_

**7) [15/16] 1<sup>st</sup> Amendment: Transformative Use & Artistic Relevance**

- a. **Transformative Use** - Is something \_\_\_\_\_ new \_\_\_\_\_ being created from the work itself?
- b. **Elements of fact and fiction put together make a work transformative and** \_\_\_\_\_ protected under the 1st Amendment \_\_\_\_\_
- c. **1<sup>st</sup> Am**: Court balances **Plaintiff's interest in their** \_\_\_\_\_ NLI \_\_\_\_\_ against the **Defendant's interest in** \_\_\_\_\_ freedom of expression \_\_\_\_\_

**[17] 1<sup>st</sup> Amendment Defense - Artistic Relevance Test**

- d. *Rogers v. Grimaldi* – Ginger Rogers sues MGM for releasing movie called “Ginger and Fred”. Allegedly misleading title is protected unless it has no relevance to the work or misleads to the work's source

ex: Ariana Grande sues  
Forever 21  
F21 hires lookalike and  
Grande sues for false  
endorsement

- e. **[18] Trademark Infringement/False Advertising**: Any person who uses a name or symbol in commerce is liable if they make a **false or misleading statement of fact** which is \_\_\_\_\_  
\_\_\_\_\_ likely to cause customer confusion \_\_\_\_\_
- f. **Business Solution** - \_\_\_\_\_ license/pay for it, don't use it/look for \_\_\_\_\_  
\_\_\_\_\_ something/someone different, get permission \_\_\_\_\_